Office-Supreme Court, U.S.
FILED
MAR 28 1962
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 3

EDWARD YELLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

RABINOWITZ & BOUDIN
30 E. 42 Street
New York 17, N. Y.

WECHSLER & DREYFUS
504 Broadway
Gary, Indiana

Attorneys for Petitioner

VICTOR RABINOWITZ
LEONARD B. BOUDIN
Of Counsel

INDEX

Cases Cited

	Page
American Communications Association v. *Douds*, 339 U.S. 382	3
Barenblatt v. *United States*, 360 U.S. 109	3
Bates v. *City of Little Rock*, 361 U.S. 512	3
Bridges v. *California*, 314 U.S. 252	3
Carlson v. *Landon*, 342 U.S. 524	3
DeJonge v. *Oregon*, 299 U.S. 353	3
Dennis v. *United States*, 341 U.S. 494	3
Murdock v. *Pennsylvania*, 319 U.S. 105	3
Shelton v. *Tucker*, 364 U.S. 479	3
Stromberg v. *California*, 283 U.S. 359	3
Sweezy v. *New Hampshire*, 354 U.S. 234	4
Thomas v. *Collins*, 323 U.S. 516	3
Thornhill v. *Alabama*, 310 U.S. 88	3
United States v. *C.I.O.*, 335 U.S. 106	3
Watkins v. *United States*, 354 U.S. 176	4
West Virginia Board of Education v. *Barnette*, 319 U.S. 624	3
Whitney v. *California*, 274 U.S. 357	3

Statute Cited

Subversive Activities Control Act of 1950, 64 Stat. 987	5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 477

EDWARD YELLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

I.

We evidently failed in Point I of our orginal brief to state our argument with clarity since the Government has misunderstood it. Thus, the Government at pages 22-26 of its brief, spends much time in refuting contentions that were never made. We did not, in our Point I, contend that the Committee had no proper legislative purpose (but see Point V of petitioner's original brief), or that non-pertinent questions were asked, or that petitioner was not allowed to state his objections, or that the Committee had resorted to "indiscriminate dragnet procedures." Neither did we

urge that the conviction should be reversed merely because the information sought of petitioner was cumulative, or because the Committee already had the information it sought of petitioner. We know that cumulative or corroborative evidence may sometimes be of slight value in some circumstances. Our argument was of quite a different order and we shall seek to restate it.

It can hardly be doubted that the freedoms protected by the Bill of Rights are the cornerstone of our democratic form of government and that the First Amendment in particular sets forth the essence of our democratic rights. It would be presumptuous for us to call to the attention of this Court the many decisions which have so held. The stirring language of Mr. Justice Jackson in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 will not be forgotten so long as our democratic form of government survives. This Court has been similarly eloquent in many other cases. See, for example, *Whitney* v. *California*, 274 U.S. 357, 372 (Brandeis, *J.*, concurring); *Stromberg* v. *California*, 283 U.S. 359; *De Jonge* v. *Oregon*, 299 U.S. 353; *Thornhill* v. *Alabama*, 310 U.S. 88; *Bridges* v. *California*, 314 U.S. 252; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Thomas* v. *Collins*, 323 U.S. 516; *United States* v. *C.I.O.*, 335 U.S. 106, 129 (Rutledge, *J.*, concurring) and many others.

Recently this Court has held, we think unfortunately, that the individual's right to speak his mind, his right of free association, his right to remain silent, may be disregarded in some circumstances. Similarly, the right of society to hear great issues debated, to enjoy the benefits of a free exchange in the market place of ideas may sometimes be denied. That such limitation on First Amendment rights threatens the existence of a democratic society can

hardly be doubted. And once this Court held that only a clear and present danger can justify such conduct.*

But more recently the Court has held that these fundamental rights may be invaded under less pressing circumstances and that it is appropriate for the courts to determine the "weight to be ascribed to the interest of Congress" in interrogating witnesses and to balance this interest against competing interests (*Barenblatt* v. *United States*, 360 U.S. 109, 126). We accept this decision, albeit reluctantly, at least until the Court shall reconsider the matter.

This, however, is not the end but the beginning of our inquiry. For certainly the Court did not intend to hold that these great pillars of our democracy could be breached by *any* congressional committee which asks *any* relevant question about *any* subject of legislative inquiry. We know the contrary is true. *Bates* v. *City of Little Rock*, 361 U.S. 512; *Shelton* v. *Tucker*, 364 U.S. 479.

We must assume that First Amendment rights weigh heavily in the scales, both for the benefit of the individual and for the benefit of society. Hence, if congressional

---

* It may not be fashionable, but we think it still worthwhile to call to the attention of this Court language it once used in describing the meaning of the clear and present danger rule.

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. These cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a libel-loving society, will allow." (*Bridges* v. *California*, 314 U.S. 252, at 263.)

interrogation is to be permitted in these areas, it must present even more weighty interests. It is in this connection that the cumulative nature of the inquiry by the Committee becomes important and that we must determine whether the questions asked are not merely corroborative of other material in the possession of the Committee. Because, while such questions may be relevant and admissible in an evidentiary sense, certainly not much weight can be ascribed to them. The Government does not contend that the information it sought of petitioner was other than cumulative or corroborative of other testimony it had received. To treat such trivia as sufficient to outweigh the public and private interests described by this Court in *Watkins* v. *United States*, 354 U.S. 176, at 197-200, and *Sweezy* v. *New Hampshire*, 354 U.S. 234, at 248-250 and 261-267, is to make of the protection offered by the First Amendment a hollow promise. We cannot believe such was the intent of this Court when it first held that the clear and present danger test could be replaced by the balancing concept which now pervades its decisions.

It is from this point of view, therefore, that we urged once again that the questions on the basis of which petitioner was convicted were trivial matters, that the answers could not in any realistic sense affect the security of our country and that they could not have served so valuable a legislative purpose that Congress might invade First Amendment rights in order to secure them.

It is in this connection likewise that we offered the testimony of Professor Emerson. At page 32 of its brief, the Government concedes that Professor Emerson's testimony provided factual considerations appropriate for the Court. It may be true, as the Government points out at that point, that Professor Emerson's conclusions were contrary to the conclusions relied upon by the Court, in

American Communications Association v. *Douds*, 339 U.S. 382; *Dennis* v. *United States*, 341 U.S. 494; and *Carlson* v. *Landon*, 342 U.S. 524. It may also be true that his testimony was contrary to the findings of Congress as set forth in the Subversive Activities Control Act of 1950, 64 Stat. 987. However, it is our understanding that the purpose of a trial is to determine disputed issues of fact. Indeed, Professor Emerson's testimony is admissible precisely because it challenges the facts which this Court accepted in other cases, especially because in none of those cases, as far as we know, was evidence presented to support the findings of fact on which the Court relied. In those cases, this Court took judicial notice of certain facts, based on purported congressional findings and on the general knowledge of the Justices of this Court. Certainly, it lies in the power of a defendant in a criminal case to prove that the factual assumptions upon which the Court and Congress proceeded are in fact incorrect.

II.

In Point II of petitioner's brief, we argued that the Committee violated its own rules in failing to consider petitioner's request for an executive session. For the most part, we think that the issue is sufficiently drawn so as to make it unnecessary to reply except for one slight respect in which we think the Government has mistaken the record. At page 38 of its brief, the Government notes that Congressman Walter testified that the Committee had passed on the question of whether or not it would hear petitioner in executive session. As often happens, petitioner and the Government have each quoted a different portions of a witness' answer, with the result that the context in which the answer is given becomes clouded. So that the Court may more clearly see this context, we quote at some length:

"Q. . . . Wasn't it possible for the Committee to hear Mr. Yellin in executive session at that time?

A. Well, the Committee already passed on the question of whether or not we would hear Mr. Yellin at a session when the purpose of calling him was discussed, and it was decided then that the rule was respect to an executive session was not applicable because the investigator—and I might say it was Mr. Collins, a former F.B.I. agent, who developed this entire matter, and we were willing to accept his story with respect to the proposed testimony.

Q. And what was his story?

A. Well, his story was that the man was a known Communist; that he had been active in the international conspiracy, and that he had deceived his employer; and, furthermore, he came within the category of those people that we were experiencing a great deal of difficulty in finding out about with respect to the colonization.

Q. Did you assume, from Mr. Collins' report, that Mr. Yellin would be a witness who would refuse to give information to the Committee?

A. We had no way of knowing.

Q. Well, what conclusions did you draw from the report of Mr. Collins which you have just related?

A. We concluded that this would be a fine witness for the Committee in support of proposed legislation having to do with colonization, and, two, having to do with the protection of our defense efforts. And it is always worth a chance that somebody will testify.

Q. But it wasn't worth the chance of calling him in executive session, to see what his position would have been?

A. I am sure that had you communicated this whole matter to the Committee before we left Washington

so that we could have given it due consideration—we would have, and always do—we might have a different situation today" (R. 70).

Congressman Walter here makes it perfectly clear that the Committee, in deciding not to hold an executive session, was violating its own rules. The rules provide that an executive session is to be granted when "the interrogation of a witness in a public hearing might . . . unjustly injure his reputation." The Committee applied a completely different test as the testimony quoted shows.

Respectfully submitted,

RABINOWITZ & BOUDIN
30 E. 42 Street
New York 17, N. Y.

WECHSLER & DREYFUS
504 Broadway
Gary, Indiana

Attorneys for Petitioner

VICTOR RABINOWITZ
LEONARD B. BOUDIN
Of Counsel

March, 1962.